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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1536

In the Matter of: JOE BRECK GANTT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

In the Matter of: JOE BRECK GANTT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OPINIONS BELOW

The opinions of the Supreme Court of Alabama sought to be reviewed are reported at 230 So. 2d 525 (1970) and 230 So. 2d 519 (1970). Copies of the opinions are appended hereto at 1a and 2a respectively. The dissenting opinions are found at 1a and 12a. The order denying a Motion for New Trial (which Motion is appended at 14a) is appended at 19a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on January 8, 1970 and rehearing was denied on February 5, 1970. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the judgment of disbarment by the Supreme Court of Alabama violates the due process and

equal protection clauses of the fourteenth amendment in that it was founded upon a federal felony conviction said to be final though appeal of the conviction is pending in the United States Court of Appeals, and whether a federal felony conviction may be deemed final while an appeal therefrom taken under 28 U.S.C. § 1291 is pending.

2. Whether the Supreme Court of Alabama had original jurisdiction to hear and determine a disbarment proceeding, this and its companion case being the first and only such proceedings in which such jurisdiction has been claimed, and, if not, whether its assumption of jurisdiction and order of disbarment violated the due process and equal protection clauses of the fourteenth amendment.

3. Whether the refusal of the Supreme Court of Alabama to allow issuance of subpoenas for witnesses to prove unequal application of the law violated the due process and equal protection clauses of the fourteenth amendment and the fair trial provisions of the sixth amendment, including the right to compulsory process.

4. Whether a court of original jurisdiction, (where judges are required at a hearing or trial to determine facts as well as law and render judgment thereon) may include an absent judge in the decision making process, the inclusion of that absent judge being essential for provision of the minimum number of judicial votes required for production of a valid decision, and whether such inclusion of the absent judge violates the rights to a fair trial and the due process and equal protection of the law guaranteed by the sixth and fourteenth amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment and the due process and equal protection clauses of the fourteenth amendment of the Constitution of the United States.

Also involved are 28 U.S.C. § 1291 and Article 6, § 140 of the Constitution of Alabama and the following provisions of the Code of Alabama (Recomp. 1958): Title 13, § 6; Title 13, § 13; Title 13, § 14, *as amended*, (Supp. 1969); Title 13, § 15, *as amended*, (Supp. 1969) and Title 46, § 49.

The Constitutional and statutory provisions are printed in the Appendix hereto, *infra*, pp. 19a-22a.

STATEMENT OF THE CASE

a. *The Proceedings Below and the Raising of the Federal Questions*

The petition seeking disbarment was instituted on August 15, 1969, on behalf of the Grievance Committee of the Alabama State Bar. (R. 5-18) The proceeding resulted from petitioner's conviction in the United States District Court for the Northern District of Alabama, of conspiring to obstruct, delay and affect commerce by extortion in violation of 18 U.S.C. § 1951(a).

The disbarment petition was heard by the Supreme Court of Alabama on October 27, 1969. Judgment of disbarment was entered on January 8, 1970. (1a)

At the proceedings the following transpired:

JUDGE LAWSON: Mr. Gantt, do you wish to answer?

MR. GANTT: If it please the Court, if I may, I would like to adopt the pleadings and evidence and the brief and the argument for counsel of Mr. Flowers.

JUDGE LAWSON: All right, sir. . . .[1]

In brief in the Alabama Supreme Court it was contended as Proposition of Law VI:

> All persons subject to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed.
> CONSTITUTION OF THE UNITED STATES
> Section I, Amendment XIV
>
> Brief and Argument of
> Richmond M. Flowers at 3(a)

The argument of "THE CONSTITUTIONAL QUESTION," *id.* at 17, under this Proposition contends:

> In construing the statute at Bar the Supreme Court is authorized to look to the administration of the statute in the past. . . .
>
> . . . .
>
> . . . The discriminatory application of the law to

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1. Transcript of Oral Proceeding Before the Supreme Court of Alabama, on Monday, October 27, 1969, at 34. This transcript is not a part of the Record herein. No oral testimony was taken. Several exhibits were offered each of which showed that other Alabama lawyers had not been subjected to disbarment after conviction and while their appeals were pending. This matter was also argued in brief in the court below. No stenographic transcript of the proceeding was available for the use of any Justice of the Supreme Court of Alabama.

> Respondent would constitute a violation of his constitutional guarantees. *Id.* at 17-18.

In conclusion it was argued:

> Is there to be equal enforcement of the law, or shall there be selective enforcement?
>
> . . . Richmond M. Flowers asks only that he be given the same rights enjoyed by other citizens of this state, and that his life, liberty, property and privileges remain inviolate until and unless he is finally adjudicated guilty of the charges against him. Richmond M. Flowers has not been "convicted". The right of appeal is sacred, and no man is guilty or "convicted" until so pronounced by the highest court. *Id.* at 20-21.

Petitioner Flowers had attempted to prove the fourteenth amendment question of an unequal application of the law against him by a request for the issuance of subpoenas for witnesses. However, the request for subpoenas was denied, thus creating fourteenth amendment due process and sixth amendment compulsory process and fair trial questions.

On January 23, 1970, petitioner filed a Motion For New Trial Or In The Alternative, Application For Rehearing Or In The Alternative, Petition For Rehearing (14a-18a) reiterating and further raising federal constitutional questions. He contended that the interpretation of conviction within the meaning of Title 46, § 49, violated the due process and equal protection clauses of the fourteenth amendment; that the refusal to issue subpoenas violated the due process and equal protection clauses of the fourteenth amendment and deprived him of a fair trial and compulsory process under the sixth amendment; that the jurisdictional holding violated the equal protection clause of the fourteenth amendment; and that

the judgment with regard to the number of concurring Justices violated the sixth amendment right to a fair trial and the due process and equal protection clauses of the fourteenth amendment. This motion was denied on February 5, 1970. (19a)

b. *The Facts*

Joe Breck Gantt was licensed as an attorney by the Supreme Court of Alabama on June 2, 1953. From 1963 to 1967 he served as Assistant Attorney General of the State of Alabama. During this period he personally sought indictments of, brought to trial and prosecuted those accused of slaying civil rights workers and otherwise interfering with the rights of Alabama's Negro citizens.

On August 2, 1968, Mr. Gantt, Richmond M. Flowers (Attorney General of the State of Alabama from 1963 to 1967) and Oscar R. Hyde were charged by indictment with conspiring to obstruct, delay and affect commerce by extortion in violation of 18 U.S.C. § 1951. A trial resulted in a verdict of guilty, and a judgment of conviction was entered pursuant to the verdict. (2a)

Messrs. Hyde and Flowers were convicted under all four counts of the indictment and were fined $10,000 each under counts one and two of the indictment and sentenced to eight year prison terms to run concurrently on each count.

The sentence imposed on Mr. Gantt was a prison term of one year and one day under the fourth count of the indictment. Five year concurrent suspended sentences were assessed under the first two counts. He was not charged under count three. He was not fined.

Petitioner filed notice of appeal of his federal conviction. Appeal is presently pending in the United States Court of Appeals for the Fifth Circuit, No. 27777.

Disbarment proceedings against Messrs. Gantt and Flowers were heard by the Supreme Court of Alabama on October 27, 1969. A motion seeking the issuance of subpoenas directed to prospective witnesses Hon. J. O. Sentell, Clerk of the Supreme Court of Alabama and Reginald Hamner, Esq., Secretary of the Alabama Bar Association was filed. The motion was overruled.

Mr. Gantt and Mr. Flowers had intended to demonstrate by the use of the subpoenas a fourteenth amendment forbidden unequal application of the law to them, by showing that other Alabama attorneys convicted of crimes were not subjected to disbarment immediately, their convictions not being deemed final until their appellate remedies were exhausted. *Cf. Hadnott v. Amos*, 394 U.S. 358 (1969).

Present and sitting in judgment at the disbarment proceedings were seven of Alabama's nine Supreme Court Justices.[2]

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2. Justices Merrill, Harwood, Coleman, Bloodworth, McCall, Maddox and Lawson. Not present were Chief Justice Livingston and Mr. Justice Simpson. The *then present* Mr. Justice Lawson *did not* participate in the decision. The *then absent* Mr. Justice Simpson *did* participate in the decision. As previously noted no stenographic transcript of the proceeding was then available. It has never been brought to the attention of the petitioner that any Justice of the Supreme Court of Alabama disqualified himself, nor is he aware of any disqualification pursuant to Ala. Code tit. 13, § 6 (1958) or tit. 13, § 15, (1958), *as amended*, (Supp. 1969).

On January 8, 1970, judgments of disbarment against Messrs. Gantt and Flowers were entered.[3] (1a, 2a). The judgments were concurred in by five Justices (Justice Simpson — *who was not present at the hearing or trial*— and Justices Merrill, Harwood, Maddox, and McCall). Mr. Justice Coleman and Mr. Justice Bloodworth dissented. Chief Justice Livingston and Mr. Justice Lawson — *who was present at the hearing or trial* — did not participate in the court's decision. All Justices participated in the refusal to rehear petitioners case. (19a)

REASONS FOR GRANTING THE WRIT

I. *Certiorari should be granted to determine whether the Supreme Court of Alabama violated the due process and equal protection clauses of the fourteenth amendment by holding that an attorney has been finally convicted of a federal crime within the meaning of Ala. Code tit. 46, § 49 (1958), even though an appeal of the conviction is pending in a United States Court of Appeals.*

The Supreme Court of Alabama recognized that,

> Reduced to the basic issue we are called on to decide the legal meaning of the word 'conviction' as it is used in this disbarment proceeding. 230 So. 2d at 521. (4a)

Elsewhere, conviction has been held not to attach for

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3. Threafter Alabama's Secretary of State, Mabel S. Amos refused to place the name of petitioner on the ballot for the May 5, 1970 Democratic Primary election. Petitioner sought the office of District Attorney in Covington County, Alabama. The refusal of the Secretary of State was based upon the judgment of disbarment and not on the criminal conviction.

statutory purposes until the accused has exhausted all his appellate remedies.[4]

In *Brooks v. Auburn University*, 296 F. Supp. 188 (M.D. Ala.), *aff'd*, 412 F.2d 1171 (5th Cir. 1969), Rev. Mr. William Sloane Coffin had been denied the right to speak on campus due to his conviction in *United States v. Coffin*, 68-CR-1-F (D. Mass. Aug. 21, 1968), *rev'd sub nom. United States v. Spock*, 416 F. 2d 165 (1st Cir. 1969).[5]

In *Brooks* District Judge Johnson said:

> In barring all speakers convicted of a felony, regulations run afoul of the ambiguity of "convicted." In most instances lawyers would use "convicted" to refer to a final conviction after all appeals had been exhausted. The meaning must be unclear, however, since here President Philpott has applied it to a speaker whose conviction is on appeal. The defendants as justification for banning the appearance and lecture of the Reverend Mr. Coffin place considerable emphasis upon the fact that he has been "convicted of a felony." As a matter of fact, this is the primary justification for the invocation of the regulations by Dr. Philpott, the effect of which

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4. See, *e.g.*, Appeal of Smith, 65 Conn. 135, 31 A. 529 (1894) (statutory prohibition of the granting of a license for the sale of intoxicating liquor to one convicted of violation of liquor law not enforceable where an appeal was taken); Donnell v. Board of Registration of Medicine, 128 Me. 523, 149 A. 153 (1930) (physician's license could not be revoked prior to final adjudication of his appeal). See also *In re* O'Connell, 182 Cal. 786, 189 P. 700 (1920); *In re* Riccardi, 182 Cal. 675, 189 P. 694 (1920); People v. Treadwell, 66 Cal. 400, 5 P. 686 (1885); State *ex. rel.* Larew v. Sale, 188 Mo. 193, 87 S.W. 2d 967 (1950). *Contra: In re* Kirby, 84 F. 606 (D.S.D. 1898); *In re* Minner, 133 Kan. 789, 3 P. 2d 473 (1931); State v. Hubbard, 58 Kan. 797, 51 P. 290 (1897); *Ex Parte* Cohen, 72 Ore. 570, 144 P. 79 (1914).

5. The proceedings against Reverend Mr. Coffin were dismissed after judgment was vacated. *New York Times*, April 23, 1970, p. 31, col. 5.

bars the Reverend Mr. Coffin from appearing and speaking . . . . As stated earlier, the Reverend Mr. Coffin has been convicted of a felony in a United States District Court in Massachusetts. This conviction is presently on appeal, and although there is no testimony on this particular point it is common knowledge that the matter will be, if necessary, litigated through the courts, including the Supreme Court of the United States. *This Court is of the opinion that the present status of the criminal prosecution against the Reverend Mr. Coffin cannot be used as a justification for the regulations in question.* As a matter of fact, the Honorable Thomas S. Lawson, then Attorney General for the State of Alabama and presently a member of the Supreme Court of Alabama, in an opinion rendered in 1940, 18 Quarterly Report of the Attorney General of Alabama 120 (1940), stated:

> A party would not be disqualified from voting who had been convicted of crime which would disqualify while his case is pending in the appellate courts as this disqualification does not attach until the case is finally disposed of and the judgment of the court of last resort has affirmed the conviction had in the trial court. 296 F. Supp. at 195-96. (emphasis added)

As the dissenting Alabama Justices stated:

> As the majority opinion points out there are two views regarding the meaning of the word "conviction" in such disbarment cases. Some courts, perhaps a majority, hold as the majority opinion holds; others as we would hold.
>
> We think the better view is that the "conviction" must be a final "conviction" and when an appeal is pending it is not. (13a)

The value of the property and human rights at issue

seems clear.[6] *Cf. Barsky v. Board of Regents*, 347 U.S. 442, 472 (1953) (Douglas, J. dissenting):

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied if they cannot work. To work means to eat. It also means to live.

II. *Certiorari should be granted to determine whether the Supreme Court of Alabama by holding that it had original jurisdiction to hear and determine the disbarment proceeding (the first and only time it has claimed such jurisdiction) violated the due process and equal protection clauses of the fourteenth amendment and the fair trial provisions of the sixth amendment, particularly the right of compulsory process.*

Article 6, § 140 of the Constitution of Alabama provides in part as follows:

> Except in cases otherwise directed in this Constitution, the Supreme Court shall have appellate jurisdiction only . . . .

Thus the court arrogated to itself a jurisdiction that it did not have and thereby deprived petitioner of procedural and substantive due process. This proceeding on its face raises the presumption that petitioner was singled out in violation of the equal protection clause of the fourteenth amendment.

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6. Alabama statutes do not provide for summary restoration to the bar in the event an appeal is successful.

The equal protection clause of the fourteenth amendment requires that all persons be treated equally and that the law not be enforced against them discriminatorially. See, *e.g.*, *Hadnott v. Amos*, 394 U.S. 358 (1969); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Petitioner sought to subpoena witnesses, *cf. Washington v. Texas*, 388 U.S. 14 (1967), to prove that he was singled out for special treatment first by the Alabama Bar Association in the preferring of charges against him prior to exhaustion of his appellate remedies, and then by the Supreme Court of Alabama. Thus denial of the right to produce witnesses resulted in violation of the due process and the compulsory process clauses and effectively deprived him of the right to prove conclusively a deprivation of equal protection.

The Supreme Court of Alabama acted not merely without jurisdiction since it has no authority under the state's Constitution to hear and determine an original disbarment proceeding, but additionally deprived petitioner of the means for proving it has never—*on not one previous occasion*—sought to exercise original jurisdiction in disbarment proceedings.

III. *Certiorari should be granted to determine whether participation in the judgment of the Supreme Court of Alabama by a member of the Court who did not hear the case (the court exercising a purported original jurisdiction), violates the sixth amendment right to a fair trial and the due process and equal protection clauses of the fourteenth amendment.*

Ala. Code, tit. 13, § 14 (1958), *as amended*, (Supp. 1969) provides:

> The concurrence of five Judges in the determination of any cause shall be necessary and sufficient thereto, except when, by reason of disqualification, the number of judges competent to sit therein is reduced to seven or to six, in which case such reduced number shall constitute the court; and the concurrence of four judges shall suffice.

No Justice disqualified himself pursuant to *Ala. Code* tit. 13, § 6 (1958) or tit. 13, § 15 (1958), *as amended,* (Supp. 1969). One of the five Justices who concurred in the majority opinion (Mr. Justice Simpson) was not present at the trial. There were no witnesses since subpoenas were not allowed. There was no transcript of the argument or proceedings for the Justice to read.

This Court has articulated the rule that "The one who decides must hear." *Morgan v. United States,* 298 U.S. 468, 481 (1936). Although subsequent cases have added some qualifications to this statement as it applies to administrative proceedings, it must under our system of justice, remain absolute for nisi prius judicial proceedings.

Since Mr. Justice Simpson did not hear, he was constitutionally precluded from deciding. His duty unlike that of the Secretary of Agriculture in *Morgan* was not merely "akin to that of a judge." *Id.* He was a judge. Without Mr. Justice Simpson's concurrence there were but four Justices. In accordance with *Ala. Code* tit. 13, § 14 (1958), *as amended,* (Supp. 1969), four Justices do not constitute a majority.

Additionally *Ala. Code* tit. 13, § 13 (1958) provides for consideration and determination by the court as a whole where there is a dissent on a material question. Here al-

though there was no disqualification of a Justice and there were two dissenters—on not merely "a material question" but, more importantly, the *sole question considered,* there was neither consideration nor determination by the court as a whole.

Only seven of the nine Justices participated in the proceedings and only six of those seven participated in the judgment. Of those six only four ruled that petitioner should be disbarred. A fifth justice who did not participate joined the four who did participate thus depriving petitioner of his procedural and substantive right to a fair trial and an equal application of Alabama's law.

Respectfully submitted,

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APPENDIX

Ex parte ALABAMA STATE BAR.
In the Matter of Joe Breck GANTT.
3 Div. 438.
Supreme Court of Alabama
Jan. 8, 1970.
Rehearing Denied Feb. 5, 1970.

McCALL, Justice.

The facts in this case are in all material respects the same as those set forth in Ex parte Alabama State Bar (In the Matter of Richmond M. Flowers) Ala., 230 So.2d 519, decided this date. The conclusions and opinions therein arrived at therefore are adopted by the court in this case.

It is accordingly ordered and adjudged by the court that the license as an attorney at law in this state of the respondent Joe Breck Gantt be and the same is hereby cancelled, and his name is ordered stricken from the rolls of the clerk of this court.

Petition granted.

SIMPSON, MERRILL, HARWOOD and MADDOX, JJ., concur.

COLEMAN and BLOODWORTH, JJ., dissent.

LIVINGSTON, C. J., and LAWSON, J., not sitting.

COLEMAN and BLOODWORTH, Justices (dissenting):

We dissent for the same reasons stated in our dissent in In the Matter of Richmond M. Flowers, Ala., 230 So.2d 519.

Ex parte ALABAMA STATE BAR.
In the Matter of Richmond M. FLOWERS.
3 Div. 437.
Supreme Court of Alabama
Jan. 8, 1970.
Rehearing Denied Feb. 5, 1970.

McCALL, Justice.

This is a disbarment proceeding, instituted originally in the supreme court against Richmond M. Flowers by a petition filed on behalf of the members of the Grievance Committee of the Alabama State Bar, by and through their attorney, for the issuance of an order directed to the respondent requiring him to show cause, if such exists, why his license as an attorney at law in this state should not be cancelled, and his name stricken from the rolls of the clerk of this court.

In the United States District Court for the Northern District of Alabama, the respondent was charged by indictment with conspiring to obstruct, delay and affect commerce by extortion in violation of Tit. 18, U.S.C.A. § 1951. His jury trial resulted in a verdict of guilty, and a judgment of guilt and conviction was entered pursuant to the verdict. The court imposed a sentence of imprisonment in the penitentiary, and a fine. The offense for which the respondent has been found guilty and convicted is a felony. Tit. 18, U.S.C.A. § 1. The respondent admits in his brief that he was adjudged guilty of a felony in the United States District Court for the Northern District of Alabama. A certified copy of the judgment of conviction by that court appears in the record but in his answer, the respondent denies that he has been convicted. He defends on the ground that because he has appealed from the United States District Court to the

United States Court of Appeals for the Fifth Circuit, there has been no conviction upon which disbarment can be had. He insists that his appeal raises substantial questions of law and fact, and is not a frivolous appeal. The respondent contends that the word "convicted" as used in this disbarment proceeding means a conviction or an adjudication of guilt, after all legal avenues of appeal have been exhausted, and that his rights as a practicing attorney at law should be preserved and maintained in statu [*sic*] quo pending the outcome of his appeal. He prays that the petition in this cause be dismissed.

The petitioners, in seeking the disbarment of the respondent, invoke the original jurisdiction of this court under Rule 37(b) of Section A, of the Rules Governing the Conduct of Attorneys in Alabama, 239 Ala. XXIII, XXV, the pertinent part of which provides as follows:

> "An attorney must be disbarred and excluded from the practice of law for any one of the following causes:
>
> * * * * * * * *
>
> "(b) Upon his being convicted by any Court of record of this State or of the United States or of any other State of any crime which by the law of the forum trying the case is a felony, in either of which cases the record of his conviction or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence."

The petitioners further seek to invoke the inherent control and jurisdiction of this court over the admissions and disbarments of attorneys at law in the State of Alabama which is a power of the court, independent of the rules in proceeding against the respondent. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671; Ex

parte Dozier, 262 Ala. 197, 77 So. 2d 903; Ex parte Cooke, 263 Ala. 481, 83 So.2d 195; McCord v. State, 220 Ala. 466, 126 So. 873; In the Matter of Donald McKay, 280 Ala. 174, 191 So.2d 1; Ex parte Denson, 235 Ala. 313, 178 So. 434; Ex parte Grace, 244 Ala. 267, 13 So.2d 178.

Each of these procedures may be considered by the court, but in so doing we must recognize that whether proceeding under Rule 37(b) or under the court's inherent power, or under both, this case turns on the meaning of the word conviction, because without a judgment of conviction, there is no evidence before us that the respondent committed the acts constituting the crime with which he is charged. Reduced to the basic issue, we are called on to decide the legal meaning of the word "conviction" as it is used in this disbarment proceeding.

The courts have given the word conviction many different legal meanings, depending on the situations in which it is used. Conviction has no fixed and inflexible meaning. As applied to criminal offenses, it is used in varied senses. Parker v. State Highway Department, 224 S.C. 263, 78 S.E.2d 382; 24 C.J.S. Criminal Law § 1556. (2), p. 383.

In Commonwealth v. Lockwood, 109 Mass. 323, 325, it is said:

> "The ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. * * *"

So in this case, we must consider the use of the word "conviction" in the light of the plain, clear language of Rule 37(b), the context in which the word is used, the purposes the rule is intended to accomplish, and the weight of authority construing its meaning in analogous situations. Again the rule provides in part as follows:

> "An attorney must be disbarred and excluded from the practice of law * *.
>
> * * * * * * * *
>
> "(b) Upon his being convicted by any court of record * * * of the United States * * *."

The use of the phrase "upon his being convicted by any court" has significance, for it points out the stage in the course of a felony criminal trial when it becomes mandatory to disbar an attorney—that is when he becomes convicted. The other requirement is that the conviction must have been "in any court of record of the United States." The United States District Court for the Northern District of Alabama, a court of record, has pronounced a judgment of conviction on the defendant.

In State ex rel. Sanford v. Riddle, 213 Ala. 430, 432, 105 So. 259, 260-261, this court said, in speaking of a statute similar in substance to Rule No. 37(b), Section A:

> "The policy of the statute is plain: When an attorney has been convicted of any criminal offense within the classes specified, the fact of conviction renders him an undesirable member of the legal profession, and, though he may in fact be innocent of the crime for which he has been convicted, the welfare of the profession, and the preservation of the public confidence in its honor and integrity, demand the removal of the convicted attorney from his position of trust and responsibility. * * *".

Commenting on this in the later case of Ex parte Cooke, 263 Ala. 481, 484, 83 So. 2d 195, 198, this court went further to say:

> "This policy, that the right of the individual must sometimes yield to the common good of the whole profession, is too firmly established to require review."

There is no reference in the rule that when an appeal is taken, there must be a delay in instituting the disbarment proceeding or a stay after its institution, or that conviction means a final conviction. The federal court in United States v. Esters, 161 F.Supp. 203, said that the presumption of innocence no longer attends the defendant after conviction, and on the contrary the presumption is that the proceedings were regular, the evidence sufficient and the trial free from error. While the appeal suspends the execution of the sentence of the criminal court pending appeal, Rule 38(a) (2) Federal Rules of Criminal Procedure, Tit. 18, U.S.C.A., Tit. 15, § 372, Code of Alabama, 1940, Recompiled 1958, the matter of the conviction remains and continues to exist. In re Kirby, D.C., 84 F. 606.

The authorities are not in harmony on the question of proceeding with disbarment when there is an appeal from a criminal conviction. The weight thereof in analogous situations however holds that an appeal from the criminal conviction is no ground for delay or postponement of disbarment.

In 7 C.J.S. Attorney and Client § 21 c. p. 740, we find the following statement:

> "It is held in some cases that an appeal so suspends the judgment in a criminal case that the attorney is

> not liable to be disbarred as for a conviction of a crime pending the determination of such appeal; but the better rule seems to be that when an attorney has been convicted of a crime it is sufficient cause for his disbarment or suspension as an attorney, notwithstanding an appeal has been taken and is pending from the conviction." See also 6 C.J. p. 587.

The case of In re Minner, 133 Kan. 789, 3 P. 2d 473, 79 A.L.R. 35, supports the majority view. There an attorney was convicted of a felony and in a show cause disbarment proceeding, the accused admitted the conviction and sentence, but denied guilt, showing the steps being taken by him to effect his appeal. He asked a delay in the disbarment proceeding until the determination of the appeal could be had. The statute involved provided that in case of the conviction of an attorney of a felony, the clerk must transmit to the supreme court a certified copy of the record of conviction, and the supreme court must on receipt enter an order of disbarment. Upon reversal of such conviction, or pardon by the Governor, the statute provided that the supreme court had the power to vacate such order of disbarment. In considering the timeliness of the proceeding the court said:

> "The urgent plea for delay or postponement of the order of disbarment until the appeal can be heard and determined is not in harmony with the terms of the statute, which itself makes specific provision, in the last sentence of the statute above quoted, for the reinstatement of the accused in case of a reversal of the conviction. This forcibly implies the legislative purpose of avoiding such delays. It was held in In re Casebier, 129 Kan. 853, 284 Pac. 611, that such plea and request under this statute were not persuasive and should not be sustained."

The respondent argues that the *Minner Case*, supra, holds that the clause in the statute giving the supreme

court power to vacate the order of disbarment on reversal of a criminal conviction indicates a legislative intent to proceed with summary disbarment pending appeal, and conversely under Rule 37(b), there being an absence of such a provision, an intent to delay or postpone the disbarment proceeding until after the appeal. We find that a similar power to reinstate, though not contained in Rule 37(b), exists under Amended Rules Governing the Conduct of Attorneys in Alabama, 239 Ala. XXIII, Section C, Rules Governing Petitions for Reinstatement of Persons who have been Suspended, Disbarred, or otherwise Excluded from the Practice of Law, wherein it is specifically provided in part as follows:

> "Any person who has been * * * disbarred, * * * may thereafter file with the Secretary * * * a sworn petition for reinstatement addressed to the Board. * * *
>
> "* * * Provided, that from the decision of the Board of Commissioners the petition shall be entitled to an appeal to the Supreme Court of Alabama as provided by Rule No. 28 of Section B."

We further think that specific provision in Rule 37(b) to vacate the disbarment upon reversal of the judgment of conviction would have no particular bearing on the meaning of the word conviction or the mandate in our rule to disbar upon conviction had in the United States District Court and would be unnecessary, because this power to vacate already exists in our Supreme Court under its inherent authority over the admissions and disbarments of attorneys in this state irrespective of a specific provision. Ex parte Cooke, 263 Ala. 481, 83 So.2d 195; Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

Further we are justified in assuming that when the

supreme court approved Rule 37(b) it had in mind its inherent powers over the admissions and disbarments of attorneys and considered it unnecessary to expressly provide for that which the court knew already existed.

In In re Lindheim, 187 N.Y.S. 211, an attorney was convicted in the federal court of a conspiracy to defraud the United States, a felony, and was sentenced to serve a term in the penitentiary. The Judiciary Law of New York provided that any attorney who shall be convicted of a felony shall cease to be an attorney and upon presentation of a certified copy of the judgment of conviction, his name shall be stricken from the roll of attorneys. The answer admitted the conviction and all other matters alleged in the petition. It further alleged that an appeal from the judgment of conviction was immediately taken by the respondent, and was being processed to a hearing and decision as rapidly as possible. In this case the court held:

> "The provisions of the Judiciary Law above cited are mandatory in case of a conviction for a felony, and upon such conviction the result prescribed follows automatically, and upon presentation of the facts to the court the prescribed order must be made. If the judgment of conviction shall be reversed upon appeal, a proper application may then be made to the court for the vacation of the order now required to be entered."

A statement of law in Ex parte Cohen, 72 Or. 570, 144 P. 79, is in line with these decisions and is as follows:

> "* * * The effect of a conviction of felony as a ground for disbarring an attorney is not annulled by a writ of error and supersedeas: In re Kirby (D. C.), 84 Fed. 606; State v. Hubbard, 58 Kan. 797, 51 Pac. 290, 39 L.R.A. 860. * * *"

In re Kirby (D.C.), 84 F. 606, 608 holds that the suing out of a writ of error in nowise affected the judgment of conviction against the respondent. The granting of the supersedeas simply stayed the execution of the judgment until the writ of error could be heard. The respondent was ordered disbarred.

In Barnes v. Lyons, 187 F. 881, decided by the Circuit Court of Appeals for the Ninth Circuit, a statute of Alaska provided that an attorney may be removed or suspended by the district court upon his being convicted of any felony or misdemeanor involving moral turpitude and in either case the record of his conviction is made conclusive evidence. The petitioner was convicted of the offense of mailing an obscene, lewd, and lascivious letter in violation of a federal statute. In its holding the court said:

> "* * * The judgment of the court pronouncing sentence was the equivalent of a charge that he had been convicted of an offense for which he ought to be disbarred, and he was in the presence of the court at the time, and no doubt would have been heard had he so requested. But the judgment is made conclusive evidence upon which his disbarment must follow, and in reality there was no defense the petitioner could interpose to excuse his conviction. It is suggested by counsel that petitioner had a right to show that he would take an appeal, but that was no defense. Indeed, it has been held that such a judgment of conviction is sufficient to warrant suspending an attorney, though such judgment has been superseded by writ of error. In re Kirby, 10 S.D. 322, 414, 73 N.W. 92, 907, 39 L.R.A. 856, 859."

The following observation was made by the court in In re Kirby, 10 S.D. 322, 73 N.W. 92, 93 where the statute made it a ground for disbarment or suspension when an attorney had been convicted of a felony or of a misde-

meanor involving moral turpitude in which case the record of conviction was conclusive evidence.

"* * * The question of guilt is not involved. Conviction is cause for disbarment or suspension. The fact of conviction is alone in issue, and the record, the legislature declares, shall be conclusive evidence of that fact. The material inquiry is simply this: Has the accused been convicted? The term 'conviction,' in its most common use, signifies the finding of the jury that the prisoner is guilty, but we think it is used in the statute under discussion as implying the judgment of a court upon a conviction or confession of guilt. Com. v. Gorham, 99 Mass. 420. Then the fact of conviction has been established in this proceeding in the manner prescribed by the statute. The existence of that fact is sufficient cause for suspension or disbarment. In a proceeding like the one at bar, under statutes substantially the same as those in this state, the supreme court of California holds that while the criminal action is pending upon appeal there is no judgment capable of being carried into effect, that it is within the range of possibilities that the judgment may be reversed, and that 'there is not such a final conviction against the defendant as the law contemplates, to justify his removal.' People v. Treadwell (Cal.) [66 Cal. 400] 5 Pac. 686. With all due respect to that learned court, we must decline to follow its decision in this case. Its conclusion seems to be based upon the clearly-erroneous assumption that the judgment in the criminal action will be reversed, and it interpolates into the statute the word 'final.' If the court has jurisdiction to try the criminal action, the presumption is that its judgment is right and will not be reversed. Beyond this, we think that the California court fails to observe the real issue of fact involved in the proceeding before it. As heretofore suggested, the issue was not whether the defendant was

guilty of the crime charged in the criminal action, but, was he convicted? That court might possibly say that the judgment was not evidence of the fact of the defendant's guilt, but it could not say it was not evidence of the fact that he had been convicted. * * *"

Whatever may be the meaning attributed to the word "conviction" with respect to its use in other situations different from the present one, it seems to us that the meaning applied in the cases cited herein, is not only the weight of authority, but also is the better reasoning. We therefore hold that under Rule 37(b), the jury verdict finding the defendant guilty and the judgment of conviction entered thereon by the United States District Court for the Northern District of Alabama constitutes a conviction under our court rule making it mandatory for this court to order the respondent disbarred and excluded from the practice of law. It is accordingly ordered and adjudged by the court that the license as an attorney at law in this state of the respondent Richmond M. Flowers be and the same is hereby cancelled and his name is ordered stricken from the rolls of the clerk of this court.

Petition granted.

SIMPSON, MERRILL, HARWOOD and MADDOX, JJ., concur.

COLEMAN and BLOODWORTH, JJ., dissent.

LIVINGSTON, C. J., and LAWSON, J., not sitting.

COLEMAN and BLOODWORTH, Justices (dissenting):

We must respectfully dissent from the majority opinion which holds that an attorney at law may be disbarred

by this court upon proof of conviction of a felony by a court of record notwithstanding he has taken an appeal from that conviction which is presently pending.

With due deference to this opinion, we must state our view that the "conviction" referred to in Rule 37(b) of Section A, of the Rules Governing the Conduct of Attorneys in Alabama, 239 Ala. XXIII, XXV, means a "final conviction."

As the majority opinion points out, there are two views regarding the meaning of the word "conviction" in such disbarment cases. Some courts, perhaps a majority, hold as the majority opinion holds; others, as we would hold.

We think the better view is that the "conviction" must be a "final conviction" and when an appeal is pending it is not.

EX PARTE: ALABAMA STATE BAR
IN THE MATTER OF:
JOE BRECK GANTT

THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1969-70
THIRD DIVISION NO. 438

**MOTION FOR NEW TRIAL
OR IN THE ALTERNATIVE, APPLICATION FOR
REHEARING OR IN THE ALTERNATIVE,
PETITION FOR REHEARING**

Comes now the Respondent, Joe Breck Gantt, and moves the Court to set aside the Judgment heretofore entered in said cause on the 8th day of January, 1970, and grant a new trial to the Respondent, and as grounds therefor assigns the following, separately and severally:

1. The judgment is contrary to law.

2. The judgment is contrary to the facts of the case.

3. For that the judgment of the Court was rendered by less than five Justices in attendance at the trial of said cause, no Justice of the Court having disqualified himself to sit.

4. For that the judgment of the Court was concurred in by a Justice of the Court not in attendance at the trial of said cause.

5. For that there was a dissent from the judgment of the Court and said cause was not considered by the Court as a whole.

6. For that the judgment of the Court overruled or materially modified a former adjudication of the Court and said the cause [*sic*] was not considered by the Court as a whole.

7. For that no Justice of the Court disqualified himself to sit at the trial of said cause and the judgment of the Court was not concurred in by five Justices of the Court qualified by reason of being present at the trial of said cause, to sit in judgment of said cause.

s/ JOE BRECK GANTT

Joe Breck Gantt
Attorney

Ex Parte: ALABAMA STATE BAR
In the matter of:
JOE BRECK GANTT

THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1969-70
THIRD DIVISION No. 438

AMENDMENT TO
MOTION FOR NEW TRIAL
OR IN THE ALTERNATIVE, APPLICATION FOR
REHEARING OR IN THE ALTERNATIVE,
PETITION FOR REHEARING

Comes now the Respondent, Joe Breck Gantt, and moves the Court to allow him to amend the aforementioned motion by adding thereto the following paragraphs:

8. For that the Court was without jurisdiction in the premises.

9. For that Respondent, Richmond M. Flowers, sought by motion appointment of an official court reporter and the issuance of supoenas directed to J. O. Sentell, Clerk of the Supreme Court of Alabama and Reginald Hamner, Secretary of the Alabama Bar Association. Said action by Respondent, Richmond M. Flowers, was equally for the benefit of Respondent, Joe Breck Gantt, but said motion was overruled and the issuance of said supoenas [*sic*] was refused. Some of the purposes of said motion and supoenas [*sic*] were to show an unequal application of the law to Respondents and to prove that other Alabama attorneys convicted of crimes of lower court [*sic*] were not subjected to disbarment immediately, there

[*sic*] convictions not being deemed final until such times as there [*sic*] appellate remedies has been exhausted. Respondent thus sought to show a deprivation of rights under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The aforementioned action of this court effected a deprivation of Respondent's right of compulsory process guaranteed by the Sixth Amendment of the Constitution of the United States.

10. Based upon the foregoing in the issuance of the opinion, [*sic*-in] the name of a Justice who did not hear the case, there being no stenographic transcript before the court, the inclusion of said name being solely to validate the court's decision, the Respondent has been deprived of his Sixth Amendment right to a fair trial and the due process and equal protection of the law by the Fourteenth Amendment of the Constitution of the United States.

11. For that Respondents were denied their right of trial by jury as guaranteed them by the due process and equal protection clauses of the Fourteenth Amendment and the jury trial provisions of the Sixth and Seventh Amendment of the Constitution of the United States.

12. For that Respondents were singled out for special treatment by the Alabama Bar Association and/or its members in preferring charges against them due to Respondent's activities in vigorously enforcing the laws of the State of Alabama gainst [*sic*] those accused of slaying civil rights workers and otherwise interferring with the rights of Negro citizens and those actively interested in the promotion of equal civil rights of all citizens in the State of Alabama. The purpose of the discovery sought by the Respondents but denied them (as previously set

forth) was to show such unequal or discriminatory treatment. In life [*sic*-light] thereof, Respondents have been denied the equal protection of the laws as guaranteed them by the Fourteenth Amendment of the Constitution of the United States.

s/ JOE BRECK GANTT

Joe Breck Gantt

SUPREME COURT OF ALABAMA
OCTOBER TERM 1969-70

3rd Div. 438 Feb. 5, 1970

Ex: Parte: Alabama State Bar
IN THE MATTER OF JOE BRECK GANTT
PETITION FOR DISBARMENT

IT IS ORDERED that the application for rehearing filed on January 23, 1970, be and the same is hereby overruled.

United States Constitution

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV.

Section One

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Constitution

Article 6, § 140

Except in cases otherwise directed in this Constitution, the supreme court shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law, except where jurisdiction over appeals is vested in some inferior court, and made final therein; provided, that the supreme court shall have power to issue writs of injunction; habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions.

ALA. CODE tit. 13, § 6 (1958):

Judge is disqualified to try certain cases. — No judge of any court, county commissioner, or justice, must sit in any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity, or in which he has been of counsel, or in which is called in question the validity of any judgment or judicial proceeding in which he was of counsel, or the validity or construction of any instrument or paper prepared or signed by him as counsel or attorney,

without the consent of the parties entered of record, or put in writing, if the court is not of record.

ALA. CODE tit. 13, § 13 (1958):

When dissent, how question determined. — When there is dissent in a section upon any material question, the same shall be considered and determined by the court as a whole.

ALA. CODE tit. 13, § 14 (1958), *as amended,* (Supp. 1969):

When concurrence of five judges, and when of four sufficient. — The concurrence of five judges in the determination of any cause shall be necessary and sufficient thereto, except when, by reason of disqualification, the number of judges competent to sit therein is reduced to seven or to six, in which case such reduced number shall constitute the court; and the concurrence of four judges shall suffice.

ALA. CODE tit. 13, § 15 (1958), *as amended* (Supp. 1969):

When judges disqualified and number reduced to eight or six, the governor appoints member of bar to sit as special judge. — When by reason of disqualification the number of judges competent to sit in a cause is reduced to eight or to six, and there is equal division among them on any question material to the determination of the case, the fact shall be certified by the chief justice, or when he is disqualified, by the judges sitting, to the governor, who shall thereupon appoint a member of the bar of the supreme court to sit as a judge of said court in the determination of said cause; and similarly when by reason of disqualification no one of the judges is competent to sit in a cause, or the number is reduced below six, the fact shall be certified by the chief justice, if he

is competent to sit, or if not, by the judge or judges sitting, or if no one is competent, by the clerk of the court, to the governor, who shall thereupon appoint a number of members of the bar of the supreme court to constitute a special court of seven members for the consideration and determination of such cause. The word "disqualification," as used in this section, being taken to include inability to sit by reason of prolonged illness of a chronic nature.

ALA. CODE tit. 46, § 49 (1958):

Causes of removal of attorney. — An attorney must be removed for the following causes by the circuit court:

1. Upon his being convicted of a felony other than manslaughter, or of a misdemeanor involving moral turpitude; in either of which cases the record of his conviction is conclusive evidence.

2. When any judgment is rendered against him, for money collected by him as attorney, upon which judgment an execution has issued, and been returned no property; in which case the record of the judgment and execution is conclusive evidence.

BRIEF
FOR
RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969
No. 1536

JOE BRECK GANTT,
Petitioner

vs.

ALABAMA STATE BAR,
Respondent

BRIEF OF RESPONDENT

Introduction

This Brief of Respondent is filed in opposition to a Petition for Writ of Certiorari to the Supreme Court of Alabama. The Respondent respectfully submits that the Petitioner has failed to present any federal question of substance not heretofore determined by this Court or decided in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

The Respondent submits that the questions presented are more clearly and accurately stated as follows:

I.

Whether the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, prevent the Supreme Court of Alabama as head of the Judicial Department of State Government from enacting a rule providing that an attorney as an officer of said Court must be disbarred "upon his being convicted by any Court of record of this State or of the United States or of any other State of any crime which by the law of the forum trying the case is a felony, in either of which cases the record of his conviction or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence"; and prevent said Court from construing its rule so as to require disbarment notwithstanding an appeal has been taken from such conviction, where the Court possesses inherent power to restore the attorney's license should the conviction be reversed.

II.

Whether the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, prevent the Supreme Court of Alabama as head of the Judicial Department of State Government from exercising its original

inherent jurisdiction to strike the name of an attorney from its roster listing the officers of said Court as duly licensed to practice law when said attorney has violated one of the Rules of the Supreme Court of Alabama governing the conduct of attorneys in Alabama.

III.

Whether the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, required the Supreme Court of Alabama to issue requested subpoenas directed to the Clerk of said Court and the Secretary of the Alabama State Bar requiring the witnesses to produce records concerning Alabama attorneys disbarred or suspended when every disbarment or suspension is a matter of public record of the Supreme Court of Alabama, the Court could take judicial knowledge of its records and counsel requesting the subpoenas could have called specific cases to the attention of the Court with adequate legal research.

IV.

Whether the Sixth and Fourteenth Amendments, United States Constitution, prevent a Justice of the Supreme Court of Alabama from concurring in a decision and opinion in a disciplinary proceeding disbarring an attorney as an officer of said Court when there was no disputed issue of fact, all evidence presented was documentary, the Justice considered the pleadings, documentary evidence and written briefs although he did not hear oral argument in the cause.

Constitutional Provisions, Statutes and Rules Involved

The Appendix to the Petition For Writ of Certiorari omits the Rule of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, the violation of which resulted in Petitioner's disbarment, namely, Rule 37, Section A, and the same is set forth in the Appendix hereto, infra, A-1 - A-2

Title 13, Section 7, Code of Alabama 1940, infra, A-2

Title 13, Section 11, Code of Alabama 1940, infra, A-3

STATEMENT OF THE CASE

The Respondent will not restate herein the history of the case or the facts involved except to point out certain pertinent facts which the Respondent deems significant. All of the pertinent facts are set forth in the Petition for Disbarment filed by the Grievance Committee of the Alabama State Bar on August 15, 1969. The Petition alleges (a) the issuance by the Supreme Court of Alabama of a license to the Petitioner, (b) the indictment by a federal grand jury for the commission of a felony, (c) the jury's verdict of guilty, (d) the judgment and commitment of the United States District Judge, (e) the order denying motion for new trial, and (f) the violation of the rule of the Supreme Court of Alabama, Rule 37, Section A. Authenticated copies of all pertinent documents were attached.

On October 24, 1969, Petitioner filed his Answer admitting all the material allegations contained in the Petition for Disbarment. The Petitioner then alleged that an appeal from the felony conviction had been perfected in the United States Court of Appeals for the 5th Circuit, thus posing a clear-cut issue of law, i.e., the meaning of the word "convicted" in Rule 37, Section A.

The statement in the pending Petition for Writ of Certiorari that the Petitioner personally sought indictments of, brought to trial and prosecuted those accused of slaying civil rights workers,

and otherwise interfering with the rights of Alabama's Negro citizens is not a "fact" in this case, and it is respectfully submitted that this so-called "fact" was never considered by the Supreme Court of Alabama. A similar allegation was made in a Petition for Rehearing filed on January 23, 1970, in affidavit form, but no evidence was presented to the Supreme Court of Alabama in support of this statement and no subpoenas were requested to obtain evidence to confirm the same.

The statement at page 7 of the pending Petition for Certiorari is not accurate in alleging that the request for the issuance of subpoenas to the clerk of the Supreme Court of Alabama and the secretary of the Alabama State Bar was denied. Subpoenas duces tecum were issued concerning certain specific records and these records were produced.

ARGUMENT

QUESTION I

Whether the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, prevent the Supreme Court of Alabama as head of the Judicial Department of State Government from enacting a rule providing that an attorney as an officer of said Court must be disbarred "upon his being convicted by any Court of record of this State or of the United States or of any other State of any crime which by the law of the forum trying the case is a felony, in either of which cases the record of his conviction or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence"; and prevent said Court from construing its rule so as to require disbarment notwithstanding an appeal has been taken from such conviction, where the Court possesses inherent power to restore the attorney's license should the conviction be reversed.

The opinions below, In the Matter of Richmond M. Flowers, 230 So. 2d 519 (1970) and In the Matter of Joe Breck Gantt, 230 So. 2d 525 (1970), contain a careful review of the authorities bearing upon this question. In re Minner, 133 Kan. 789, 3 P. 2d 473; In re Lindheim, 187 N.Y.S. 211; Ex parte Cohen, 72 Or. 570, 144 P. 79; In re Kirby (D.C.). 84 F. 606; Barnes v. Lyons, 187 F. 881; In re Kirby, 10 S.D. 322, 73 N.W. 92. The Court concludes: "Whatever may be the meaning

attributed to the word 'conviction' with respect to its use in other situations different from the present one, it seems to us that the meaning applied in the cases cited herein is not only the weight of authority, but also the better reasoning". It is respectfully submitted that those cases cited by Petitioner for the proposition that "conviction" of a felony did not justify disbarment of an attorney pending his appeal from such conviction assumed, perhaps erroneously, that the statute or rule required permanent disbarment. The Supreme Court of Alabama observed that it possessed inherent power over admissions and disbarments. This inherent power would authorize this Court to take any action deemed appropriate pending Petitioner's appeal from the felony conviction and this same inherent power could be exercised in the event the conviction should be reversed.

Petitioner cites and quotes from Brooks v. Auburn University, 296 F. Supp. 188 (M. D. Ala.), aff'd., 412 F. 2d 1171 (5th Cir. 1969) District Judge Johnson stated in Brooks:

"The principal constitutional provision involved in this case is, of course, the First Amendment, which provides:

> 'Congress shall make no law -- abridging the freedom of speech -- or the right of the people peaceably to assemble.' - - - -

"There is no relationship between a speaker's criminal conviction -- especially

one on appeal -- and the value of his words to the listener -------"

There is, indeed, a relationship between an attorney's felony conviction and his right to remain an officer of the courts entrusted with the most intimate personal and financial affairs of his clients. The purpose of Rule 37, Section A, of the Supreme Court of Alabama is not the punishment of the Petitioner, but rather the protection of the courts, attorneys, and the public at large when a grave doubt has been raised concerning an attorney's fitness to remain an officer of the courts entitled to practice law.

Brooks makes reference to the 1940 opinion of the Attorney General of Alabama which held that a party is not disqualified from voting because of conviction of crime until the conviction is affirmed on appeal.

Freedom of speech, the right of people peaceably to assemble, and the right to vote are basic civil rights. Here we are not concerned with a basic civil right available to all citizens, but with a special privilege - the privilege of remaining an officer of the courts intrusted with the lives and fortunes of others. Certainly, an attorney's license could not be revoked for an arbitrary reason having no relationship to his fitness to remain an officer of the courts. The right to pursue one's chosen profession is a precious liberty. Barsky v. Board of Regents, 347 U. S. 442, 472 (Douglas, J. dissenting).

It is respectfully submitted that no one would seriously question the right of the Committee on Character and Fitness of the Alabama State Bar to refuse admission to a new applicant who was admittedly a convicted felon, notwithstanding the fact that an appeal had been taken from such conviction. "The term 'good moral character' has long

been used as a qualification for membership in the Bar and has served a useful purpose in this respect." Konigsberg v. State Bar of California, 353 U.S. 252, 262." "--It is equally clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little protection---" Barsky v. Board of Regents, supra.

Is the grave doubt which exists concerning the Petitioner's fitness and good moral character and the serious danger to the courts, fellow attorneys and the public any less because he was a licensed attorney rather than an applicant for admission? As stated by the Supreme Court of Alabama in Ex parte Cooke, 263 Ala.481, 484, 83 So.2d 195, 198

"This policy, that the right of the individual must sometimes yield to the common good of the whole profession, is too firmly established to require review."

As heretofore noted, the Supreme Court of Alabama has inherent power to take such action in the future as the circumstances may warrant.

We are not concerned with an interpretation of Title 46, Section 49, Code of Alabama, 1940, as Petitioner erroneously assumes - See Reasons For Granting The Writ I. The Supreme Court of Alabama has construed and applied its own Rule 37, Section A.

QUESTION II

Whether the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, prevent the Supreme Court of Alabama as head of the Judicial Department of State Government from exercising its original inherent jurisdiction to strike the name of an attorney from its roster listing the officers of said Court as duly licensed to practice law when said attorney has violated one of the Rules of the Supreme Court of Alabama governing the conduct of attorneys in Alabama.

The statement contained in question 2 in the pending Petition for Writ of Certiorari is not quite accurate, namely, 'whether the Supreme Court of Alabama had original jurisdiction to hear and determine a disbarment proceeding, this and its companion case being the first and only proceedings in which such jurisdiction has been claimed,---" (emphasis added)

In a series of cases the Supreme Court of Alabama has referred to the fact that the power to disbar exists inherently as well as by statute in each of the courts of the State.

In McCord v. State, 220 Ala.466,477, 126 So. 873, 883, the Court observed:

'---The power (to disbar) exists inherently as well as by statute in each of the courts of the state. ---It is well settled that the Legislature may provide that certain acts or conduct shall require disbarment, but 'the accepted doctrine is that statutes and rules merely regulate the power to disbar instead of creating it, and that such statutes do not restrict the general powers of courts over attorneys, who are its officers,

and that they may be removed for other than statutory grounds.' 6 C.J., p. 584, where many adjudicated cases are cited." (emphasis added) See Ex parte Thompson, 228 Ala. 113, 152 So. 229; In the Matter of Donald McKay, 280 Ala. 174, 191 So.2d 1; Ex parte Denson, 235 Ala. 313, 178 So. 434; Ex parte Grace, 244 Ala. 267, 13 So.2d 178.

Courts have generally given recognition to statutory grounds and methods of discipline of attorneys only insofar as the same are (a) reasonable and (b) do not purport to interfere with the inherent power of the Courts over the subject. Courts can discipline attorneys for causes other than those set forth in statutes and in a method other than that provided therein.

The original jurisdiction of the Supreme Court of the United States to disbar an attorney who "---has been guilty of conduct unbecoming a member of the bar of this court, ---" as provided in Rule 8, Revised Rules of the Supreme Court of the United States is not dependent upon legislative action.

True, Article 6, Section 140, Alabama Constitution, 1901, provides that the Supreme Court of Alabama shall have "---appellate jurisdiction only, ---" This refers to jurisdiction over law suits, or suits inter partes. A disciplinary proceeding against an attorney is not a law suit. It is an inquiry by a court concerning the fitness of one of its officers.

QUESTION III

Whether the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, required the Supreme Court of Alabama to issue requested subpoenas directed to the Clerk of said Court and the Secretary of the Alabama State Bar requiring the witnesses to produce records concerning Alabama attorneys disbarred or suspended when every disbarment or suspension is a matter of public record of the Supreme Court of Alabama, the Court could take judicial knowledge of its records and counsel requesting the subpoenas could have called specific cases to the attention of the Court with adequate legal research.

The question as presented by the Petitioner is somewhat misleading in one respect since it implies there was an absolute refusal of the Supreme Court of Alabama to issue any subpoenas. The Court did issue certain subpoenas and certain records were produced. See footnote 1, p. 4 of the pending petition which states "No oral testimony was taken. Several exhibits were offered each of which showed that other Alabama lawyers had not been subjected to disbarment after conviction and while their appeals were pending ---" The exhibits relating to one case refute Petitioner's contention that he was singled out for treatment different from that afforded all Alabama attorneys in previous disbarment proceedings insofar as an appeal from a felony conviction is concerned. The records of the Court of Appeals of Alabama in the case of DeGraffenreid v. State, 28 Ala.App.291, 182 So.482, and the records of the Supreme Court of Alabama reveal that (1) on October 6, 1936, Frank

M. DeGraffenreid was convicted of forgery in the second degree in the Circuit Court of Russell County, Alabama; (2) on October 6, 1936, Notice of Appeal was filed; (3) on December 3, 1937, he was disbarred; and (4) on April 12, 1938, the conviction was reversed and remanded by the Court of Appeals of Alabama.

Every felony conviction by a court of record, whether it be a state or federal court, is a matter of public record. Every disbarment or suspension of an Alabama attorney is a matter of public record with the Clerk of the Supreme Court of Alabama since an order must be entered in the records of the Supreme Court of Alabama reflecting the disbarment or suspension whether the disciplinary proceeding originated with the Board of Commissioners of the Alabama State Bar, a circuit court or in the Supreme Court of Alabama. Petitioner did not request the issuance of any subpoenas but counsel for the attorney in the companion case simply was seeking to have the Clerk of the Supreme Court and the Secretary of the Alabama State Bar perform his legal research for him.

Although the foregoing is a complete answer to the Petitioner's contention, it should be noted that Petitioner refers to the "compulsory process" provision of the Sixth Amendment, United States Constitution, Disciplinary proceedings against attorneys are not "criminal prosecutions" within the scope of the Sixth Amendment. Randall v. Brigham, 74 U.S.523; Ex parte Wall, 107 U. S. 265.

QUESTION IV

Whether the Sixth and Fourteenth Amendments, United States Constitution, prevent a Justice of the Supreme Court of Alabama from concurring in a decision and opinion in a disciplinary proceeding disbarring an attorney as an officer of said Court when there was no disputed issue of fact, all evidence presented was documentary, the Justice considered the pleadings, documentary evidence and written briefs although he did not hear oral argument in the cause.

Five justices concurred in the decision and opinion in the instant case; two did not participate; and two dissented. There was full compliance with Title 13, Section 14, Code of Alabama, 1940, as amended (Supp.1969). This would have been true if there had been five concurring justices and four dissenting justices.

Petitioner's reference to Title 13, Section 13, Code of Alabama, 1940, is misleading. This section must be read in pari materia with Title 13, Section 11, which provides:

"The court may sit, hear, consider, and determine causes and exercise all its powers and jurisdiction, in sections of five judges, such sections to be constituted from time to time by the chief justice, who as far as practicable must be a member of all sections; and any section of which it is impracticable for the chief justice to be a member shall be presided over by that one of the associate justices in such section who has precedence on the bench."

The Court heard this matter en banc initially. If one section of the Court had considered this case and there had been a dissent in that section, then the entire Court would have been required to determine the cause, and the concurrence of five would have been necessary.

The Petitioner acknowledges that no oral testimony was taken. A subpoena was served on the Secretary of the Alabama State Bar and he produced certain records although he was not placed upon the witness stand.

All of the pleadings, the written briefs, and documentary evidence was available to Mr. Justice Simpson who was not present at the hearing. Boiled down to its essence the Petitioner complains that he did not receive a fair trial because Mr. Justice Simpson did not hear the oral argument.

Title 13, Section 7, Code of Alabama, 1940, contains, inter alia, the following:

"---Whenever a case is argued orally, the opinion must be delivered by a justice who heard the oral argument;----" Mr. Justice McCall heard the oral argument and delivered the opinion. Petitioner would have no grounds for complaint if Mr. Justice Simpson had delivered the opinion since the Supreme Court of Alabama has held that the above quoted statute is directory only and not binding on the court. Alonzo v. State ex rel Booth, 283 Ala. 607, 629.

Petitioner quotes the famous sentence from Morgan v. United States, 298 U.S. 468, 481, that "The one who decides must hear." That case is clearly distinguishable.

In the instant case there were no disputed issues of fact, all evidence tendered was documentary, and exhaustive briefs were filed with the Supreme Court of Alabama. The transcript of the hearing before the Supreme Court of Alabama held on October 27, 1969, is not a part of the Record herein, but the same consists entirely of legal argument. It is doubtful whether a party has any absolute right to present oral argument on points of law when written briefs are permitted. The Petitioner was not prejudiced by Mr. Justice Simpson's absence at the presentation of this oral argument.

Again Petitioner alludes to the Sixth Amendment, United States Constitution; and again we reiterate that disciplinary proceedings are not "criminal prosecutions". Randall v. Brigham, supra, and Ex parte Wall, supra.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Rule 37, Section A, Rules Governing The Conduct of Attorneys in Alabama

A member of the State Bar shall not appear on behalf of a client before a public officer, board, committee or body, or any member thereof, that he is an attorney representing such client.

Any attorney who shall do or be guilty of any of the acts forbidden or prohibited by any of the foregoing rules of Section (A) hereof may be the subject of disciplinary action by public or private reprimand or by suspension from the practice of law or by exclusion and disbarment therefrom.

An attorney must be disbarred and excluded from the practice of law for any one of the following causes:

(a) When any judgment is rendered against him for money collected by him as attorney upon which judgment an execution has issued and been returned no property, in which case the record of the judgment and execution or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence, unless such judgment has been set aside, reversed, or annulled.

(b) Upon his being convicted by any Court of Record

of this State or of the United States or of any other State of any crime which by the law of the forum trying the case is a felony, in either of which cases the record of his conviction or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence.

But no attorney shall be subject to disciplinary measures for any action on his part who, prior to such action, has received from the Grievance Committee its written opinion that such action was justifiable or permissible.

Title 13, Section 7, Code of Alabama, 1940

No justice of the supreme court, or judge of the court of appeals of Alabama shall participate in the decision of any cause in the supreme court or court of appeals appealed to said supreme court or court of appeals from any lower court of the state of Alabama, of which lower court said justice was judge at the time said cause was decided, and who presided at the trial of said cause in said lower court. Whenever a case is argued orally, the opinion must be delivered by a justice who heard the oral argument; and when the justices divide in their opinion, the opinion must not be delivered by a justice who dissents from the opinion of the majority.

Title 13, Section 11, Code of Alabama, 1940

The court may sit, hear, consider, and determine causes and exercise all its powers and jurisdiction, in sections of five judges, such sections to be constituted from time to time by the chief justice, who as far as practicable must be a member of all sections; and any section of which it is impracticable for the chief justice to be a member shall be presided over by that one of the associate justices in such section who has precedence on the bench.